[APPELLATE CRIMINAL JURISDICTION]

CUSSEN, J.

August 19, 1939.

PUBLIC PROSECUTOR

v.

HAJI ISMAIL & ANOTHER.

[SELANGOR CRIMINAL APPEAL No. 29 of 1939]

Evidence Enactment (Cap. 10) Ss. 33, 114, 133—testimony of accomplice—rule requiring corroboration—limits of.

The rule that it is unsafe to convict on the uncorroborated evidence of an accomplice is not inflexible and the same degree of moral turpitude does not attach to a person who gives a bribe on the demand of or on a threat by a police officer as to a person who seeks out the police officer and offers him a bribe to avert a legitimate prosecution. A Magistrate should first decide whether a witness is an accomplice; then determine on the evidence whether he is corroborated in any material particular; and then, if he is not corroborated, subject the accomplice's evidence to a close scrutiny to satisfy himself that, without corroboration, there is nevertheless evidence which is credible and sufficient to establish the guilt of the accused.

Cases referred to:—

(1) *King-Emperor v. Malhar,* I.L.R. 26 Bomb. 193.

(2) *Queen-Empress v. Maganlal & Another* I.L.R. 14 Bomb. 115.

(3) *R. v. Baskerville,* (1916) 2 K.B. 658 at p. 667.

(4) *R. v. Feigenbaum,* 14 Cr. A.R. 1.

(5) *R. v. Archibald King,* 10 Cr. A.R. 117.

(6) *R. v. Koh Soon Poh,* 6 M.L.J. 120.

MAGISTRATE'S CRIMINAL APPEAL.

J. F. Draper, Deputy Public Prosecutor for Public Prosecutor. The Grounds of Judgment shew that the Magistrate misdirected himself in law. The only order he asked for was an order for retrial before a different Magistrate and therefore he did not propose to deal with the facts further than was necessary to illustrate the precise point of law involved. He made two submissions:—

1. Prosecution Witnesses 4, 5, 6 and 7 were not ACCOMPLICES so far as the offence charged against the Respondents was concerned.

2. Even if they be deemed to be accomplices the Magistrate never applied his mind to what was the real test in dealing with accomplice evidence viz:—"Knowing that the witnesses are accomplices of the Respondents, and that as such their evidence must be scrutinized with the greatest care do I (a) nevertheless believe their evidence or (b) do I disbelieve it".

The Magistrate contented himself with saying that the evidence of the witnesses referred to was the evidence of accomplices and that he *MUST* disbelieve it unless it was corroborated in some material particular by independent evidence. That was not the law, and the Magistrate misdirected himself in law in reaching his decision on those grounds.

AND first are the prosecution witnesses 4, 5, 6 and 7 Accomplices? An accomplice is one concerned with another or others in the commission of a crime (*Wharton's* Legal Lexicon 14th Ed. p. 13. *Archbold,* p. 440.)

An accomplice is one who confesses himself a Criminal. No man ought to be treated as an accomplice on mere suspicion unless he confesses that he had a conscious hand in the crime or he makes admissions of facts showing that he had such a hand. If the evidence of a witness falls short of these tests he is NOT an accomplice and his testimony must be judged on the principles applicable to ordinary witnesses.

He called attention to Section 133 Evidence Enactment. The Magistrate in citing Section 114 omitted to note that the opening words of the Section are that he MAY presume not that he MUST presume.

Clearly the Magistrate was wrong in setting aside and failing to give any weight to the evidence of the witnesses produced before him on the grounds that such witnesses were accomplices. An analysis of the Evidence Enactment and all the cases may be stated in the following propositions:

(a) As a matter of law the uncorroborated evidence of an accomplice is sufficient to support a conviction (Section 133 Cap. 10).

(b) As a matter of Policy it is generally unsafe to rely on such evidence alone unless it is corroborated in some material particular which tends to fix the guilt on the particular person charged. (Cap. 10 Section 114) *R. v. Baskerville,*[3]; *R. v. Koh Soon Poh,*[6]; *R. v. Archibald King,*[5]; *R. v. Feigenbaum,*[4].

In considering (b) it should be borne in mind that all accomplices cannot be treated on the same footing. The same degree of moral turpitude does not attach to a person who gives a bribe on the demand of or on a threat by a peace Officer improperly to prosecute him (as alleged here)—as to a person who seeks out

the same police Officer and offers a bribe to him to stave off a legitimate prosecution. Some accomplices have been likened unto "Tame Cormorants fishing for prey with ropes round their necks" Other persons have been described as accomplices merely because they were present at the commission of a crime and did nothing to prevent or disclose it.

In judging the evidence the reason why accomplice evidence is subjected to close scrutiny is

> "The real danger is that when a man knows that his own guilt is detected he will purchase immunity by falsely accusing others."

Here the Magistrate did not consider the evidence at all, he did not consider what, if any, weight should be attached to it. He rejected it on a submission of law made to him by Counsel for the Defence:—"That the charge failed and a conviction could not be had because the evidence given by the prosecution (apart from formal evidence) was the evidence of accomplices". That submission was wrong.

K. K. Benjamin for the Respondents.

On the submission of the learned Deputy Public Prosecutor he did not agree that witnesses 4, 5 and 7 were not accomplices.

Witness No. 4 was the man who alleged he paid the money to No. 5 to be given to defendant and saw No. 5 pay it to the defendant.

The money was alleged to have been paid in the presence of No. 7 who had been a shareholder in the business with No. 5.

The Magistrate in his grounds of judgment says Nos. 4 and 5 are the principal witnesses and rightly holds them as accomplices.

They were only corroborated by No. 7 who was also an accomplice.

Ex: "B". The Chinese account Book where certain payments were entered did not corroborate the story of the accomplices.

In *R. v. Koh Soon Poh*[6] it was held that an entry in the Books kept in the regular course of business is corroborated but in that case the name of the accused and also his nickname appeared.

In any case Ex: "B" was kept by the accomplice and as such it affords no corroboration.

He agreed that all accomplices cannot be treated on the same footing, *King-Emperor v. Malhar*[1] but on the facts of this case there is no distinction between accomplices who volunteer to assist in the receipt of illegal gratification and those who assist under compulsion—*Queen-Empress v. Maganlal & Another*[2].

The correct position is that knowing that witnesses are accomplices, as such their evidence must be scrutinised with the greatest care and then, if believed, convict—if not believed, acquit, but there must be exceptional circumstances for not applying the presumption under Section 114 (b) of the Evidence Enactment.

The learned Magistrate's mind being directed to Section 114 (b) and section 133 of the Evidence Enactment he used his discretion in not accepting the evidence of accomplices and so acquitted the accused.

Cussen, J.—This is an appeal by the Public Prosecutor against the decision of the Magistrate, Kuala Langat, given on 1st March 1939 in Summons Cases Nos. 9—10B in which the two Respondents were charged with three offences under section 161 Penal Code, *i.e.* accepting an illegal gratification.

The Magistrate acquitted and discharged the accused.

The case presented by the Prosecution against the accused was, briefly stated, as follows.

The two accused are Malay police constables stationed at Batu Laut in the District of Kuala Langat.

One Tan Juan Swee (P.W. 4) is the proprietor of a coffee shop at Batu Laut and also the part owner of a lorry which was used on the public roads for the conveyance of goods. The lorry is registered in his name but owned by the "Hai Lee" kongsi, comprised of over 10 persons.

The lorry was driven by a paid driver (P.W. 5), there being also an attendant (P.W. 6).

The prosecution case is that one day about 6—7 p.m. the two accused police constables came to where the lorry was, close to Batu Laut village, being unloaded and told the driver the lorry was overloaded. The driver denied this. That then accused No. 1 asked for tea-money to refrain from applying for a summons, whereupon the driver went to his employer Tan Juan Swee and told him what had happened and asked him to give $2/- to the police constables. As a result this was done, and $2/- was paid to accused No. 1 in the coffee shop—accused No. 2 being present. This was in October 1938. That on two subsequent occasions in November and December 1938 two further

sums of $2/- were paid in the coffee shop to accused No. 1—accused No. 2 being present on each occasion.

For the prosecution evidence was given by the coffee shop keeper Tan Juan Swee (P.W. 4), the driver (P.W. 5), the lorry attendant (P.W. 6) and one Lim Chin Hor (P.W. 7), one of the partners in the Hai Lee kongsi (the owners of the lorry) who happened to be in the coffee shop on the third occasion in December when the money was paid and saw the payment being made.

The day book of the business kept by Tan Juan Swee was also produced containing entries made by him of the payments.

The two accused were defended by Mr. Sen, advocate and solicitor.

At the close of the prosecution case, accused No. 1 gave evidence; the record does not show whether accused No. 2 was directly asked if he wished to give evidence or not.

But after accused No. 1 had given evidence Mr. Sen closed the defence and addressed, saying *inter alia:*

> "Witnesses 4, 5, 6 and 7: they are accomplices .... First charge we have the evidence of prosecution witnesses Nos. 4 and 5 both accomplices. Therefore the charge fails. Same thing as regards No. 2. Charge No. 3 we have evidence of prosecution witnesses Nos. 4, 5 and 7 all are accomplices. Cannot convict on 3rd charge on their evidence alone. Law requires corroboration by an independent witness.... Not proper to convict accused without corroboration from untainted source".

After reply by the Police Officer conducting the prosecution who did not deal with the law, the learned Magistrate acquitted and discharged the accused, recording at the time the following note:—

> "After hearing arguments from both sides and having considered for some length the evidence produced I find that the charges against the defendants have not been conclusively proved".

That decision appears to have been given straightaway on conclusion of the addresses on 1st March.

The Public Prosecutor filed a notice of appeal on 6th March.

The subsequent Petition of Appeal containing the detailed grounds of appeal is dated 3rd April. They are set out as follows:—

> "Your petitioner is dissatisfied with the decision of the Magistrate on the grounds following:—
>
> (a) In finding that in law on the facts proven in evidence that the prosecution witnesses Tan Juan Swee, Lim Kwee Yam, Tan Yin, Lim Chin Hor were accomplices of the defendants or abetted them....
>
> (b) In finding that the evidence of the said witnesses in law required corroboration.
>
> (c) In finding that the books of the Hai Lee Lorry Kongsi were not corroboration of the evidence of the said witnesses....
>
> (e) In holding....that there was a rule established by the practice of the Courts that though a conviction on the uncorroborated testimony of an accomplice is not illegal it is, nevertheless improper, and that such rule necessitated some degree of corroboration of the testimony of an accomplice.
>
> (f) In holding that there was no evidence against the second defendant and in failing to consider or apply sections 34, 35 and 37 of the Penal Code...."

The learned Magistrate has written lengthy and very careful grounds of judgment.

He first finds that the witnesses Tan Juan Swee (the coffee shop keeper) and the driver are accomplices. "The principal witnesses for the prosecution are prosecution witnesses Nos. 4 and 5. In fact the success or failure of the prosecution depends almost entirely on their evidence. P.W. 4 is an accomplice.... So is P.W. 5".

He then proceeds to direct himself on the law relating to accomplices as follows:—

> "4. Section 133 of the Evidence Enactment reads 'An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice'. This section must be read together with section 114 illustration (b) of the same Enactment which reads 'The Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars'. The question therefore is, what are the rules under which the Court may give effect to these two seemingly contradictory rules in cases falling under this section. Now it is a rule established by the practice of the Courts, that though a conviction on the uncorroborated testimony of an accomplice is not illegal, it is, nevertheless, improper. This rule then necessitates some degree of corroboration of the testimony of an accomplice to warrant a conviction for an offence under this section (**Gour** on the Penal Law of India 2nd edition p. 816)".

Again the following:—

> "For a charge of bribery against a public servant the evidence should be conclusive (**Gour's** Penal Law 2nd edition p. 806)".

Now these sentences which are complete quotations from Dr. Gour's work are, in my opinion, not a correct statement of the law. At any rate I think it evident

that when read without any qualification or explanation they are very apt to be misleading; and to suggest that what is called a "rule" is a rule in the sense of something that must invariably be applied. The language also suggests that in all cases a conviction on the uncorroborated testimony of an accomplice is improper. I take the meaning of improper as something which should not be done, which it is wrong to do.

I do not of course say that the learned author meant this, but he omits to explain that whether or not the so-called rule is to be applied is a question which the Court must consider and decide in each particular case, and that all that can be said is that in most cases the Courts do apply this rule.

Instead of using the word "rule" which as I have said may mislead, I prefer to use the words of the Evidence Enactment, for this "rule" is simply the presumption set out in illustration (b) to Section 114 of the Evidence Enactment (Cap. 10), *i.e.* "that an accomplice is unworthy of credit unless he is corroborated in material particulars". But section 114 sets out very clearly how the Court should decide whether or not to make that presumption. It reads "The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case".

The words are "may presume", not "shall presume"; and I would especially emphasise the words "in their relation to the facts of the particular case".

There is no question of the mechanical application of any general rule of presumption. When it is a question of this particular presumption, the credibility of the witness who is in the position of an accomplice must be individually judged just as any other witness, the same considerations being applied, with the added one that he is an accomplice. The Court must consider who and what he is, his demeanour, bearing, the manner and quality and substance of his evidence in itself and in relation to all the circumstances of the case. The nature, quality and degree of his complicity must be examined. Then finally the Court must form its opinion whether he is to be given credit and his evidence accepted without corroboration or not.

He is a competent witness and as such is entitled to have his credibility judged in itself; his evidence must be weighed and examined and not put aside unjudged and unconsidered because he is an accomplice.

I am satisfied that this is what happened in this case. The Magistrate has applied the so-called "rule" automatically. He has not judged the evidence of these accomplice witnesses. This clearly reveals itself in his grounds of judgment. He first decides that these witnesses are accomplices; he then considers whether there is any independent evidence in corroboration—he finds none and so he acquits the accused. It is entirely mechanical.

I do not blame the learned Magistrate for his error in misdirecting himself. The legal aspects of the argument are only presented to him from one side—that of the defence—and incorrectly he is told "the law requires corroboration". He finds statements in the only commentary available which, as I have shown, lead to the same error.

As regards the question as to whether these witnesses were accomplices I think the test is whether they could be charged as abettors. In my opinion the giver of a bribe, even though he gives it in response to a demand or a threat is clearly open to a charge of abetment. The doctrine of legal necessity is only an excuse within the limits set out in section 94 of the Penal Code *Queen-Empress v. Maganlal & Another,*[2].

But as stated in the judgment of Fulton, J. in the later case *King-Emperor v. Malhar,*[1] "it must be remembered that all persons coming technically within the category of accomplices cannot be treated as on precisely the same footing". Thus the same degree of moral turpitude does not attach to the person who gives a bribe on demand or threat as to a person who himself is the tempter and offers a bribe, though both alike are abettors.

It is clear that in this case the coffee-shop keeper and the driver are abettors.

The grounds on which the Magistrate held Lim Chin Hor to be an accomplice are very slight, but on the view of the facts taken in his respect he might just technically be considered an abettor on the ground that he acquiesced and offered no objection to the payment, he being held to have been at the time one of the part-owners of the lorry.

I do not consider it necessary or desirable that I should deal with any of the other questions raised in this appeal as I have come to the conclusion that there must be a re-trial of these cases. I have come to that conclusion solely for the reason I have set out already —that there was misdirection in law, the result of which was that the most material evidence for the prosecution has not in fact been subjected to judicial examination and judgment.

I do not wish my decision to be taken as implying my view of the merits of the cases.

I would only point out that, judging from the record, the legal basis of the prosecution case against the 2nd accused does not appear to have been explained and stated to the Court below.

The order of the Magistrate acquitting and discharging the accused is set aside, and I direct that there be a re-trial of these cases before another Magistrate.

Retrial ordered.

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.) & GORDON-SMITH, Ag. J.A.

December 12, 1939.

LEE PAK YIN & ANOTHER

v.

LIEW SIEW YIN & ANOTHER.

[PERAK CIVIL APPEAL No. 11 of 1939]

Courts Enactment, Ss. 10, 26—appeals—transfer from one Appeal Court to another—jurisdiction—stay of proceedings pending disposal of appeal—grounds on which stay may be granted.

Under section 10 of the Courts Enactment the sittings of the Court of Appeal are fixed by the Chief Justice with the concurrence of the High Commissioner, and appeals from the decision of the Court of a Judge at Ipoh are ordinarily heard at the Court of Appeal held at Ipoh, in accordance with the Gazette Notification. Only the Chief Justice can transfer an appeal from one Appeal Court to another, or direct that an appeal be heard otherwise than provided for in such notification. Such a transfer should, in the absence of consent, only be made when the disposal of the appeal is a matter of extreme urgency.

Seethai Achi v. Moneylending Firm of A.N. (4) followed.

In a proper case the Court of Appeal, under section 26 of the Courts Enactment, whenever or wherever it is sitting, can direct a stay of execution or suspend proceedings under any decision appealed from.

Cases referred to:—

(1) *Blakeney v. Dufaur,* 57 E.R. 451.

(2) *Prosonomoyi Devi v. Madhab Rai,* I.L.R. 5 All 557.

(3) *Rowe v. Wood,* 37 E.R. 740.

(4) *Seethai Achi v. A. N. Firm,* (1931–1932) F.M.S.L.R. 234.

(5) *Sidheswari v. Abhayeswari,* I.L.R. 15 Cal. 818 at 822.

(6) *Watkins v. Brent,* 40 E.R. 313.

MOTION.

Braddell (*Ramani* with him) for Appellant:

The application is for transfer of the Appeal from Ipoh or for stay.

I move now only for stay.

This is a suit against trustees to have them removed.

Two elementary rules of the Courts are:—

1. A receiver is never appointed against trustees except on a special case—properly made out, and
2. On an interim application the Court would never try the issues.

The case of *Blakeney v. Dufaur,*[1] cited for the Respondents in the Court below also decides that a Court will not decide such matters on an interlocutory application.

The other cases cited refer to the power to remove.

It is conceded that in a proper case there exists such a power.

But the cases cited have nothing to do with the appointment of a receiver against executors.

The only case relevant and appropriate was cited by us:

Prosonomoyi Devi v. Madhab Rai,[2].

The rules of the Court of Chancery are made applicable by our Section 500.

The rule in India is the same as the rule in England.

See also *Sidheswari v. Abhayeswari,*[5].

Rowe v. Wood,[3] commented on trying issues on affidavits.

As to the true rule see also *Watkins v. Brent*[6].

A Receiver is never appointed when there is a person in legal possession.

I submit *prima facie* the order is one proper to appeal from and therefore a stay is not unjust.

Hastings for the respondents:—This Court has no power to make any order at this stage.

No doubt the Court can order stay.